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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-676

* * *

W. J. ESTELLE, JR.,

Petitioner

V.

HARRY LEE WILLIAMS

Respondent

* * *

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR THE PETITIONER

* * *

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W. J. ESTELLE, JR.
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HARRY LEE WILLIAMS,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 500 F.2d 206.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 6, 1974, and the Petition for Certiorari was filed in this Court on November 29, 1974. Certiorari was granted on January 27, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), and Section 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."

The Fourteenth Amendment provides:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

QUESTIONS PRESENTED

1. WHETHER A DEFENDANT'S TRIAL IN JAIL CLOTHING DESTROYS THE "PRESUMPTION OF INNOCENCE" SO AS TO DENY HIM A FAIR TRIAL?

2. SINCE THERE MAY BE A POSSIBIL-

ITY OF SOME UNFAIRNESS TO A DEFENDANT WHO IS TRIED IN JAIL CLOTHES, SHOULD A RULE PROSCRIBING THE TRIAL OF A DEFENDANT IN JAIL CLOTHES BE ACCORDED ONLY PROSPECTIVE APPLICATION?

STATEMENT OF THE CASE

Williams was convicted in the 177th Judicial District Court of Harris County, Texas, for the offense of assault with intent to murder with malice. Williams plead not guilty, was found to be guilty by the jury, and was assessed by the court as punishment confinement for ten years in the state penitentiary. The said judgment and sentence was appealed to the Court of Criminal Appeals of Texas, and said judgment of conviction was affirmed in an opinion delivered February 9, 1972, styled Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972). Williams in his state court appeal, raised substantially the same issue that was raised in his application for writ of habeas corpus in the United States District Court below, and in the United States Court of Appeals for the Fifth Circuit.

Respondent filed his application for writ of habeas corpus in the United States District Court for the Southern District of Texas, and on October 2, 1973, the District Court denied relief holding that Williams' trial in jail clothing, while inherently prejudicial, was under the facts presented, harmless error. Williams appealed this decision to the United States Court of Appeals, and on September 6, 1974, the Fifth Circuit reversed the holding of the United States District Court ruling that Williams'

trial in jail clothing was inherently prejudicial and was not harmless error.

It is now the established rule in the Fifth Circuit that the trial of a criminally accused attired in prison clothing infringes the fundamental right to the presumption of innocence. See Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert. denied 404 U.S. 897 (1971), and Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967). This per se rule adopted by the Fifth Circuit automatically upends the conviction of all defendants tried in jail clothing with the exception of the following modifications:

(a) When a defendant is on trial for a prison offense against a fellow inmate in an environment where such clothing is the normal attire, there is no prejudice for the jury to see that which is already known. United States ex rel Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973).

(b) If trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

(c) If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts any essential or material fact, then the trial of a defendant in jail clothes may be harmless beyond a reasonable doubt. Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973).

SUMMARY OF ARGUMENT

1. The Constitution of the United States

guarantees to a defendant a fair trial, not a perfect trial. Petitioner therefore states that the trial of a defendant in jail clothing does not destroy his right to a fair trial by creating in the minds of the jury an inference of guilt. Since jurors are aware that defendants are arrested and kept in jail prior to the time they are brought to court for trial, they would also expect a defendant to appear in the courtroom in jail uniform. Certainly, being tried in jail clothes is no more prejudicial than the reading to the jury of the indictment which charges the defendant with a crime, the reading to the jury of prior convictions in the indictment for purposes of enhancement under recidivist statutes, or the reading to the jury of multi-count indictments and the use of multi-defendant trials as authorized by Rules 8 and 13 of the Federal Rules of Criminal Procedure.

2. While a ruling by this Court proscribing the trial of a defendant in jail clothes might avoid some unfairness at trial by enhancing the reliability of the fact-finding process, the rule should not be applied retroactively since trial in jail clothing is not so fundamentally unfair that it infects a criminal proceeding with a clear danger of convicting the innocent. The Fifth Circuit's holding that trial in jail clothes destroys the fairness of a defendant's trial has caused a flood of writs to be filed by prisoners tried or contending they were tried in their prison clothes. Prior to the Fifth Circuit's decision in Hernandez, supra, no federal court had set aside a state conviction solely because a defendant was tried in jail clothes. Trial in jail clothing was said to be "inherently unfair" in Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967), but

the decision granting relief was based on the ineffective assistance of counsel. Petitioner's stance on this position is supported by the holding in Xanthull v. Beto, 307 F. Supp. 903 (S.D. Tex. 1970), decided three years after the decision in Brooks, and in which a federal district judge in Houston, Texas, ruled that trial in jail clothes was not inherently prejudicial.

ARGUMENT

1. A DEFENDANT'S TRIAL IN JAIL CLOTHING DOES NOT DESTROY THE "PRESUMPTION OF INNOCENCE" SO AS TO DENY HIM A FAIR TRIAL.

Petitioner respectfully submits that the trial of a defendant in jail clothing does not suggest or indicate to the jury that the defendant is guilty. The fact that a defendant wore jail clothes during a jury trial does not create a negative inference. A juror could certainly be expected to know that many defendants who are arrested are kept in jail prior to the time they are brought to court for trial. This fact does not destroy the presumption of innocence and neither should the presumption of innocence be destroyed by their being seen in the courtroom in jail attire. A defendant's presence before the jury in jail clothing only confirms that he has been held in jail prior to the time of the trial, and Petitioner strongly maintains that this does not influence the jury to find the defendant guilty.

Petitioner states that the nature of clothing worn by a defendant is not so inherently prejudicial as to deny him his right to a fair and impartial

trial, and that the testimony given in a representative case presently pending in the Fifth Circuit, Scruggs v. Estelle, No. 74-3180, supports this position. In Scruggs the following testimony developed at a state habeas hearing reflects the following by three jurors who testified at the state habeas hearing concerning the defendant's trial in jail clothes.

Juror Clemons:

> "Q. Mrs. Clemons, do you recall how the Petitioner was dressed on the occasion of that trial?
>
> A. No, I have a vague recollection of a gray or blue and white but I couldn't describe what he was wearing at all.
>
> Q. Do you recall whether or not the way that he was dressed in any way affected your verdict?
>
> A. No, it didn't affect me.
>
> Q. I will ask you whether or not you were satisfied in your own mind based purely on the evidence that you heard from the witness stand that he was guilty?
>
> A. Yes.

Q. And, in the occasion of fixing his punishment, did the manner in which he was dressed in any way affect the punishment that you gave him?

A. No." (S/F 5).

Juror Austin:

"Mr. Austin, do you now recall how Mr. Scruggs was dressed at that trial?

A. Yes, sir, I do. He was dressed just as he is right now sir.

Q. The same type of blue coveralls that he's wearing now?

A. Yes, sir.

Q. Do you recognize that as being any particular type of attire?

A. Not necessarily so. It's a uniform-type coverall which is about all I can say about it.

Q. Do you recall any identifying marks that he had on his clothing at that time?

A. No, sir, I sure don't.

Q. In the course of your deliberations as a juror, I will ask you whether or not the manner in which he was dressed influenced your verdict?

A. No, sir. I can say definitely not because I was more or less interested in the facts rather than on the appearance of him.

Q. All right, sir, and I will ask you whether or not that in any way influenced the amount of punishment that you gave him?

A. No, sir, it did not." (S/F 7, 8).

Juror Fenton:

"Q. Do you recall whether or not the manner in which he was dressed in any way affected your verdict?

A. I don't think the manner in which he was dressed would have influenced it very much. If it had of, it probably would have been in sympathy with the defendant." (S/F 11).

Williams was represented by retained counsel at trial (A. 51), who made no objection to his being tried in jail clothes as he felt such an objection would be futile. (A. 57-59). At the voir dire examination of the jury panel in Williams' state court trial, the prosecuting attorney asked this question of the prospective jurors,

> "This defendant is sitting in jail clothes. I am assuming he's been in jail to the time of this trial. You are not to take this into consideration. The fact a man is in jail clothes shouldn't make you feel he is guilty any more than if he were in street clothes.
>
> "The second thing, often times evidence will come out that a person has been in jail for seven months or eight months awaiting trial. By the same token, this should not be taken into consideration on your verdict, because you are supposed to go straight down the line, guilty or not guilty, and not let how a person is dressed influence your decision. Could you do that in this case?" (Ex. 30, 31).

The prosecutor also asked the jurors

> "I have gone over reasonable doubt, gone over the business of how the defendant was dressed, the fact he

> may or may not have been in the jail all this time. Would your answers be any different than the other jurors? Would you give us a fair trial as well as this defendant?" (Ex. 33).

Also during the voir dire of the jury, the defense attorney asked the prospective jurors

> "As you heard, he is in jail clothes. Would that effect anyone's opinion of him?" (Ex. 35).

No juror indicated that he would be prejudiced because Williams had on jail attire.

The only references made to Williams being in jail clothes at trial was when the complaining witness identified him as

> "He's the fellow with the white uniform on." (Ex. 42);

and when another witness testified,

> "Well, he approached the gentleman sitting over there in the uniform." (Ex. 87).

Marion Sanford, Jr., an attorney who practiced in Harris County, Texas, at the time Williams was tried, stated in an affidavit

> "I will state that in the few criminal

> cases which I have participated in, it is my opinion that the wearing of jail clothing by the defendant does not make a significant difference before the jury." (Ex. 190, 191).

Petitioner's position is supported by the United States District Court for the Southern District of Texas which, (before the Fifth Circuit's decision in Hernandez v. Beto), held in Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970), that

> "The tenuous possibility that the jury might have been influenced for or against defendant's guilt in this case by his jail clothing is too frail a reed to rely upon as a predicate for setting aside the state court conviction."

The court also held that a defendant's attire in jail clothing could have aroused the sympathy of the jury and thereby mitigated other overwhelming direct evidence of his guilt.

In Hall v. Cox, 324 F.Supp. 786 (W.D. Va. 1971), the court held that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law, and the Tenth Circuit has held that the nature of clothing worn by a defendant is not inherently prejudicial to his right to a fair and impartial trial.

In United States v. Williams, 498 F.2d 547 (10th Cir. 1974), a federal prisoner was displayed before the jury while wearing soiled jail clothing. Although the defendant declined an offer by the Deputy Marshal to change to his street clothes the United States District Judge held:

> "It's the Court's judgment, however, that there has not been any substantial prejudice by reason of appearance for this much of the trial in the T-shirt and levi's."

The Tenth Circuit in Watt v. Page, 452 F.2d 1174 (1972), cert. den. 405 U.S. 1070 (1972), expressly rejected the Fifth Circuit's holding in Hernandez v. Beto, and said at page 1176,

> "We do not hold that the nature of the clothing worn by the petitioner at his trial was inherently prejudicial of his right to a fair and impartial trial."

This case was sent back for further development of the facts, and on the second appeal the Tenth Circuit again reaffirmed their view that the clothing worn by a defendant at his trial is not inherently prejudicial to his right to a fair and impartial trial. See Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973). The last writing to Petitioner's knowledge on this issue by the Tenth Circuit is found in United States v. Williams, supra. In that case the Tenth Circuit again said they expressly rejected the per se rule of the Fifth Circuit as set out in Hernandez v. Beto.

The Fourth Circuit is in accord with the Tenth Circuit and has stated that in the absence of a showing of prejudice, a defendant is not denied a fair trial because he appeared before the jury in his prison uniform. See McFalls v. Peyton, 270 F.Supp. 577 (W.D. Va. 1967), aff'd 401 F.2d 890 (4th Cir. 1968), cert.den. 394 U.S. 951 (1969). To the same effect is Hall v. Cox, supra, where the court stated that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law. See also May v. Peyton, 268 F.Supp. 928 (W.D. Va. 1967), rev'd on other grounds, 398 F.2d 476 (4th Cir. 1968).

The position of the Ninth Circuit on this question is not clear as the court held in Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972), that compelling the accused to wear prison clothing may deny to him the presumption of innocence.

Although the Third Circuit appears to be in accord with the proposition that the appearance of a defendant before a jury in prison clothing unconstitutionally infringes his due process right to be presumed innocent until proven guilty, Gaito v. Brierley, 485 F.2d 86 (3rd Cir. 1973), at least one of the judges of that Circuit disagrees with the holding. See Lemons v. United States, 489 F.2d 344, 347 (3rd Cir. 1974).

Certainly being tried in jail clothes no more destroys the presumption of innocence than does the reading to the jury of the indictment which states that the grand jurors, good and lawful men, upon their oath do swear that a defendant has committed some act that is against the peace and dignity of the State.

The appearance of a defendant in jail clothing also would not be any more prejudicial to a defendant than the alleging and reading to the jury that is to decide a defendant's guilt or innocence, prior convictions of the defendant. However, in Spencer v. Texas, 385 U.S. 554 (1967), this Court upheld the Texas practice of reading the prior convictions to the jury at a one-stage trial despite Spencer's claim that the Texas use of prior convictions was so egregiously unfair upon the issue of guilt or innocence as to offend due process and thus deprive him of a fair trial.

This Court recognized that there was a possibility of some collateral prejudice with this procedure but decided that on a general "fairness" approach, the Fourteenth Amendment is not violated because another method may seem to be fairer or wiser, or to give a surer promise of protection to the prisoner at bar. As Mr. Justice Stewart recognized in his concurring opinion in Spencer,

> "If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion . . .But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in these recidivest cases. The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate.

> Upon that question I am constrained to join the opinion and judgment of the Court." 385 U.S. at 569.

Mr. Chief Justice Warren and Mr. Justice Fortas, in their concurring and dissenting opinion held that even though they felt the procedure was prejudicial, the prejudicial impact was not so great as to warrant retroactive application.

An even greater possibility of prejudice (than might be generated by the reading and proof of prior convictions for punishment enhancement) is found in the use of multi-count indictments and multi-defendant trials as permitted by Rules 8 and 13 of the Federal Rules of Criminal Procedure. Under the authority of these rules, promulgated by this Court, an information charging 225 separate and distinct crimes was upheld in United States v. Taylor, 207 F.2d 437 (2nd Cir. 1953). In Brandenburg v. Steele, 177 F.2d 279 (8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 of their predecessor statute, the Court observed:

> ". . .In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with

> long established and conventional federal procedure."

In United States v. Weber, 437 F.2d 327 (3rd Cir. 1970), cert. denied 402 U.S. 932, the Court upheld the use of an eight count indictment which charged both "malum in se" and "malum prohibitum" offenses. The Court said at page 333:

> "In the absence of an affirmative showing of impermissible harm, the mere fact that the crimes carry different labels is not determinative." (Emphasis supplied).

Surely the impact upon a jury is just as great -- where a multi-count indictment is read to them at the beginning of a trial and proof is offered as to all offenses -- as where a defendant is exhibited to a jury in jail clothes. Nevertheless, the federal practice of multi-count indictments (and multi-defendant trials) finds continued sanction in federal decisions.

Petitioner would strongly urge that a trial of a defendant in jail clothes be equated with the Federal Rule 8 and 13 practice and that this Court should decide that no conviction, where a defendant is tried in jail clothes, be overturned "in absence of an affirmative showing of impermissible harm".

2. SINCE THERE MAY BE A POSSIBILITY OF SOME UNFAIRNESS TO A DEFENDANT WHO IS TRIED IN JAIL CLOTHES, A RULE

PROSCRIBING THE TRIAL OF A DEFENDANT IN JAIL CLOTHES SHOULD BE ACCORDED ONLY PROSPECTIVE APPLICATION.

In determining whether a new rule is to be given retroactive application, this Court has held that the criteria guiding resolution of the question implicates (a) the purpose to be served by the new standard, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard. Stovall v. Denno, 388 U.S. 293 (1967). This Court has given complete retroactive effect to a rule, where the " 'major purpose' of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious question about the accuracy of guilty verdicts in past trials. . ." Williams v. United States, 401 U.S. 646 (1971). Examples are the right to counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963); on appeal, Douglas v. California, 372 U.S. 353 (1963); or at some forms of arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961).

This Court recognized in Johnson v. New Jersey, 384 U.S. 719 (1966), that the question of whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process at trial is necessarily a matter of degree, and is a question of probabilities.

Petitioner respectfully submits that the trial of a defendant in jail clothes is not so fundamentally unfair that it will infect a criminal proceeding with the clear danger of convicting the innocent. Although this Court recognized that it was unfair to have a defendant appear in a lineup without the aid of counsel, United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967), the probabilities of infecting the integrity of the truth determining process by denial of counsel at the line-up were not so great as to justify giving the decision retroactive application. Petitioner would urge that the trial of a defendant in jail clothes, when related to guilt or innocence is not so great as to undermine "the very integrity of the fact finding process" and to involve a "clear danger of convicting the innocent." Linkletter v. Walker, 381 U.S. 618 (1965). See also Adams v. Illinois, 405 U.S. 278 (1972), where this Court held that although the presence of an attorney at a preliminary hearing could make a significant contribution to the enhancement of the fact finding process, the lack of counsel at such hearing was not so fundamentally unfair as to require retroactive application.

Insofar as the reliance on past decisions is concerned, Petitioner wishes to point out that the Fifth Circuit had not, prior to Hernandez, set aside a state conviction solely because a defendant was tried in jail clothes. Trial in jail clothing was discussed in Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967), but the discussion on jail clothing was dicta, as the decision granting relief was based on the ineffective assistance of counsel. Courts in other circuits prior to the decision in Hernandez had ruled that trial in jail clothes was not inherently unfair and required the prisoner to show prejudice.

See McFalls v. Payton, supra. Of greater significance is the fact that a federal district judge in Houston, Texas, ruled in 1970, three years after the decision in Brooks, that trial in jail clothing was not inherently prejudicial. See Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970). In view of the fact that these courts had indicated after Brooks, that trial in jail clothes was not inherently prejudicial, the state was not unjustified in allowing trial of defendants wearing jail clothes in the absence of an objection by the defense.

Although the Fifth Circuit indicates that Williams was compelled to wear a prison uniform at his trial, the record does not support this conclusion. The United States District Court in its opinion held that the state trial judge in Williams had a practice of allowing defendants to stand trial in civilian clothing if requested, and that this practice was followed by certain of the other trial judges in Harris County, Texas. See Ex Parte Kelly, 484 S.W.2d 773, 774 (Tex.Crim. 1972). In the Kelly case, an attorney in private practice who had been a prosecutor in the state district court testified that the trial judge would, upon request, arrange to have any defendant tried in civilian clothes. Further, he testified that the reputation of the judge prior to the decision in Hernandez v. Beto, supra, was that he would always allow any defendant who so desired to be tried in civilian clothes. The lawyer testified that on one occasion the trial judge furnished one of his own suits to a defendant who wore it during the trial.

In the case at bar, the affidavit of an attorney who practiced in the court in which

Williams was convicted stated that

> "From my past associations and dealings with Judge Love, it is my opinion that he would have sustained any objection to a defendant's wearing jail clothes and would have made every reasonable attempt to see that the defendant was supplied with civilian clothing to wear at a trial." (Ex. 193, 194).

In addition the certificate of the state court trial judge who tried Williams states that if at any time a defendant or his attorney made known to him before or during a trial that he did not wish to be tried in jail clothing, the trial judge would have granted his request and permitted him time to obtain civilian clothing to wear at his trial. The trial judge further certified that had such a request been made by Respondent Williams, he would have granted the request and permitted him to be tried in civilian clothing. (Ex. 186-188). The prosecutor at Williams' state court trial testified at the federal habeas hearing that Judge Love's policy in regard to the wearing of jail clothes as of 1970 was

> "If anybody ever made an objection we would permit people to bring up clothes and dress them out, let them use the jury room. In fact, one instance, a defendant was tried in Judge Love's suit. This was prior to this. Judge Love lent him

> a suit, not the one he had on, he didn't go out in just his robe, he got another suit and lent it to the man. I remember this happened, and on several occasions he had people that came up that brought clothing from home and we permitted them to dress back in the jury room." (A. 86,87).

Petitioner has pointed out this testimony to show this Court that defendants were not compelled or forced to go to trial in jail clothing. While it may have been customary for defendants to be outfitted with jail uniforms while they were in jail pending their trial, and while it may have been customary for them to be brought to trial in these uniforms, it was also customary for them to be tried in any type of clothing they wished, provided they or their attorney made such a request to the state court trial judge. Petitioner would state that to the best of his knowledge, no courts in the State of Texas have tried defendants in jail clothing since the Hernandez decision was handed down by the Fifth Circuit on April 15, 1971.

The effect on the administration of justice of the Fifth Circuit's unequivocal holding that trial in jail clothes infringes a fundamental right to the presumption of innocence has caused a flood of writs to be filed by prisoners tried or contending they were tried in their prison clothes. In the State of Texas alone, there have been 10 cases considered by the Fifth Circuit on the jail clothes issue and 9 more are in the process of being appealed. There

are at present 13 cases pending in the United States District Courts on the prison clothes question. These statistics do not include the jail clothes cases in the state courts of Texas and which will be in the federal courts upon the exhaustion of state court remedies.

The decision in the instant case holding that waiver of a jail clothes objection cannot be inferred from failure to object if trial in prison garb is "customary" in the jurisdiction will serve as a stimulus to all defendants to claim error by contending they were tried in jail clothes. Any defendant who was tried in his prison clothes on either a primary conviction or a prior conviction used for enhancement will be entitled to a new trial under the holding of the Fifth Circuit, subject to the showing by the State of overwhelming evidence of guilt or an admission from a defendant's attorney that he allowed the defendant to be tried in jail clothes to invoke jury sympathy.

In an attempt to preclude any significant adverse effect upon the administration of justice, the Fifth Circuit in their decisions on jail clothes following Hernandez has held that where proof of a defendant's guilt is overwhelming, the trial of a defendant in jail clothes may be harmless beyond a reasonable doubt. See Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973). The Hernandez and Thomas holdings are judicially illogical for if trial in jail clothing infringes upon the presumption of innocence and destroys the fundamental fairness of a trial, the presumption cannot be resuscitated and the trial cannot be resurrected by any amount of strong and

convincing evidence of guilt. In their attempt to minimize the effect of Hernandez upon the administration of justice, the Fifth Circuit is establishing case law that is inconsistent and will generate many judicial problems.

Petitioner respectfully submits that a defendant's conviction should not be overturned when, as here, the evidence clearly shows that (a) the defendant was not forced to wear jail clothes, (b) his attorney was competent and did not object to the defendant's being tried in jail clothes, and (c) the trial judge would have permitted the defendant to wear civilian clothing upon a request. For these reasons, Petitioner would ask this Court to hold that any decision proscribing a defendant's trial in jail clothing be applied prospectively only.

CONCLUSION

For the reasons here given, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief Of The Petitioner has been served on the Attorney for Respondent by placing same in the United States Mail, certified, postage prepaid, addressed to: Mr. Ben L. Aderholt, Attorney at Law, 711 Fannin, Suite 1100, Houston, Texas 77002, on this the ____ day of March, 1975.

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